

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

VERNADO MALONE,

Plaintiff

v.

UNITED STATES,

Defendant

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CAUSE NO. 3:06-CV-016 RM

OPINION AND ORDER

Vernado Malone, a *pro se* prisoner, filed a motion to stay the judgment and a notice of appeal. It appears that it is not the judgment, but the filing fee order that Mr. Malone seeks to have stayed. Mr. Malone voluntarily dismissed this case and he argues that, but for the delay caused by the prison mail, he would have succeeded in dismissing it before this court's filing fee order was entered. What Mr. Malone misunderstands is that it would not have mattered whether his motion to dismiss had arrived before the filing fee order was entered. As the order of dismissal explained, "if a prisoner brings a civil action . . . the prisoner shall be required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). *See also Newlin v. Helman*, 123 F.3d 429, 434 (7th Cir. 1997) *overruled on other grounds* by *Lee v. Clinton*, 209 F.3d 1025 (7th Cir. 2000), and *Walker v. O'Brien*, 216 F.3d 626 (7th Cir. 2000). Mr. Malone brought this lawsuit while he was a prisoner, therefore the filing fee had to be assessed. If his motion to dismiss had not been delayed in the mail and had it arrived before the filing fee order was entered, the

court would have entered a filing fee order at the same time that it granted his motion to dismiss.

Mr. Malone filed a notice of appeal but he did not pay the filing fee or seek leave to proceed on appeal *in forma pauperis*. Nevertheless, he does not qualify to proceed *in forma pauperis* because, “[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). To the extent that he is appeals the judgment, the appeal is not taken in good faith because he voluntary dismissed this case and it was dismissed without prejudice. To the extent he is appealing from the imposition of the district court filing fee, the appeal is not taken in good faith because a prisoner who files a lawsuit must be assessed the filing fee pursuant to 28 U.S.C. § 1915(b)(1).

Mr. Malone may still proceed with this appeal, but to do so he must pay the full \$455.00 filing fee in advance.

For the foregoing reasons, the court:

- (1) **DENIES** Vernado Malone leave to proceed on appeal *in forma pauperis*;
- (2) **GRANTS** Vernado Malone to and including May 10, 2006, within which to pay the \$455.00 appeal fee;
- (3) **CAUTIONS** Vernado Malone, that if he does not pay this filing fee by that date, this appeal may be dismissed without further notice without affecting his obligation to pay the filing fee in installments; and
- (4) **DIRECTS** the clerk to forward a copy of this order to the Seventh Circuit.

SO ORDERED.

ENTERED: April 19, 2006

_____/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court